IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Ohio Bell Telephone Company d/b/a AT&T Ohio, 45 Erieview Plaza, #1600 Cleveland, OH 44114	)	
Plaintiff,	)	Case No. 2:09-cv-00918-ALM-MRA
v.	)	
Alan R. Schriber, Chairman, Ronda Hartman Fergus, Commissioner, Valerie A. Lemmie, Commissioner, Paul A. Centolella, Commissioner, and Cheryl L. Roberto, Commissioner, in their official capacities as Commissioners of the Public Utilities Commission of Ohio 180 E. Broad Street Columbus, OH 43215	)	District Judge Algenon L. Marbley Magistrate Judge Mark R. Abel
and	)	
Intrado Communications Inc., 1601 Dry Creek Drive Longmont, Colorado 80503	)	
Defendants.	)	

DEFENDANT INTRADO COMMUNICATIONS INC.'S MERIT BRIEF

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The PUCO specifically undertook a qualitative analysis and determined that Intrado Comm's 911 service allows for origination as required by 47 U.S.C. § 153(47). The PUCO understood the hookflash capability inherent in Intrado Comm's 911 service, and specifically concluded that "call transfers and conferencing involve call originating" via hookflash, enabling communication between a PSAP, a 911 caller, and a third party. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385 (1999); *Provision of Directory Listing Information under the Telecomms. Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001); *Telecommunications Relay Servs. and Speech-to-Speech Servs. for Individuals with Hearing and Speech Disabilities, et al.*, 18 FCC Rcd 12379 (2003).

The PUCO precisely tracked the FCC's definition of intercommunication in concluding that Intrado Comm's 911 service meets that definition. Consistent with FCC statements, the PUCO took "into account the network architecture of Intrado" and correctly determined that Intrado Comm's 911 service permits a PSAP to receive calls from multiple locations and 911 callers, in sharp contrast to a dedicated point-to-point private line service. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385 (1999); *Provision of Directory Listing Information under the Telecomms. Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001).

The PUCO correctly determined that Intrado Comm's service, which interconnects 911 callers, PSAPs, and first responders in the same geographic area, fulfills the FCC's criteria for satisfying this prong of the statutory definition. By using a "means of communicating information within a local area" and "a central switching complex which interconnects all subscribers within a

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DEFENDANT INTRADO COMMUNICATIONS INC.'S MERIT BRIEF

Defendant Intrado Communications Inc. ("Intrado Comm"), by and through its undersigned attorneys, hereby submits its responsive brief to the Initial Brief on the Merits of Plaintiff The Ohio Bell Telephone Company ("AT&T") regarding the *Arbitration Award*[1] and *Entry on Rehearing*[2] issued by the Public Utilities Commission of Ohio ("PUCO") in its arbitration of an interconnection

[1] Ohio Case No. 07-1280-TP-ARB, *Petition of Intrado Commc'ns Inc. for Arbitration Pursuant to Sec. 252(b) of the Commc'ns Act of 1934 as amended, to Establish an Interconnection Agreement with the Ohio Bell Tel. Co. dba AT&T*, Arbitration Award (Mar. 4, 2009) ("*Arbitration Award*") (Record Index No. 36) (Attachment No. 1).

[2] Ohio Case No. 07-1280-TP-ARB, *Petition of Intrado Commc'ns Inc. for Arbitration Pursuant to Sec. 252(b) of the Commc'ns Act of 1934 as amended, to Establish an Interconnection Agreement with the Ohio Bell Tel. Co. dba AT&T*, Entry on Rehearing (June 17, 2009) ("*Entry on Rehearing*") (Record Index No. 46) (Attachment No. 2).

agreement between Intrado Comm and AT&T. The PUCO's arbitration decision and interpretation of the Communications Act of 1934, as amended (the "Act"), is supported by federal law as well as the arbitration record on which the PUCO based its decision. Accordingly, AT&T's challenge of the PUCO's decision should be denied.

INTRODUCTION

AT&T first allocated wireline emergency access via the digits "9-1-1" in 1965, and the telephonic code has grown to function as "a single, nationally used three-digit number that is easy to remember and dial in emergency situations." *Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced Emergency 911 Calling Sys.*, 9 FCC Rcd 6170, ¶¶ 3-4 (1994) ("*E911 NPRM*"); *see also* Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, 1287 ("911 Act") (mandating the digits "9-1-1" as the universal number for emergency calling). Since that time, the Federal Communications Commission ("FCC") and Congress have consistently recognized the centrality of 911 services[3] in carrying out the statutory mandate to "promot[e] safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151. By enabling emergency services personnel to respond more quickly and efficiently, 911 services protect property and safeguard lives. *See Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 11 FCC Rcd 18676, ¶ 5 (1996) ("*1996 E911 Order*"). The PUCO likewise has a critical role in the oversight of 911 services. *See, e.g.*, OHIO REV. CODE § 4931.60 (creating an Ohio 911 service program within the PUCO); *VoIP E911 Order* ¶¶ 31, 33 (noting that Sections 251(e) and 706 of the Act give state commissions the authority to oversee the deployment of 911 services); *id.* ¶ 32 ("In the 911 Act, Congress made a number of

[3] As used herein, "911 services" includes both basic 911 services, where calls dialed to 911 are transmitted from the service provider's switch to a single geographically appropriate public safety agency, and enhanced 911 or "E911" services, which route 911 calls to a geographically appropriate public safety agency based on the caller's location and also provide the call taker with the caller's call back number or automatic numbering information ("ANI") and location information or automatic location identification ("ALI"). *See E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd 10245, ¶¶ 12-13 (2005) ("*VoIP E911 Order*").

findings regarding wireline and wireless 911 services, including that 'improved public safety remains an important public health objective of Federal, State, and local governments and substantially facilitates interstate and foreign commerce,' and that 'emerging technologies can be a critical component of the end-to-end communications infrastructure connecting the public with emergency [services].'") (citing 47 U.S.C. § 615(a)(3)). The PUCO also has a significant role in the development of competitive telecommunications markets, which includes the competitive 911 market. *See, e.g., The Pub. Util. Comm'n of Tex., et al.,* 13 FCC Rcd 3460, ¶ 52 (1997); *American Commc'ns Servs., Inc., et al.*, 14 FCC Rcd 21579**,** ¶ 35 (1999).

Emergency calling services have historically been the province of incumbent local exchange carriers ("ILECs") like AT&T, and today represent the last remnant of the monopolistic telecommunications market that existed prior to the passage of the Telecommunications Act of 1996 (the "1996 Act").[4] Thus, Intrado Comm's Intelligent Emergency Network® 911 service offering ("IEN") represents the first true competitive offering in the forty-year history of 911 service. Relying on robust Internet protocol ("IP") technology, Intrado Comm's 911 service substitutes for ILEC routing and transport of emergency calls to the appropriate Public Safety Answering Point ("PSAP"),[5] along with database management services for accurate emergency service dispatch, but goes well beyond legacy ILEC systems. IEN allows new technologies, devices and applications to access the 911 system and gives PSAPs and first responders immediate access to critical information such as medical records, building blueprints, etc., all part of a continuum inherent in any particular 911 call. For example, Intrado Comm's IEN can transmit 911 calls originating from end users subscribing to both traditional voice providers (*e.g.*, AT&T) and non-traditional providers (*e.g.*, cable companies, Google, OnStar) as well as from non-traditional devices (*e.g.*, 911 "texts" from a wireless

[4] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[5] A "PSAP" is a "point that has been designated to receive 911 calls and route them to emergency service personnel." 47 C.F.R. § 20.3.

device or FDA-approved defibrillators embedded in a person's chest that can automatically "call" 911 as soon as a heart attack begins). As a competitor, Intrado Comm offers PSAPs a technologically progressive alternative to traditional, ILEC-maintained, wireline-based 911 systems consistent with Congressional goals and mandates. *See, e.g., Implementation of the NET 911 Improvement Act of 2008*, 23 FCC Rcd 15884, ¶ 22 (2008) ("*NET 911 Order*") ("as Congress recognized, the nation's 911 system is evolving from its origins in the circuit-switched world into an IP-based network") .

AT&T's Initial Brief virtually ignores the reason that Intrado Comm seeks interconnection with AT&T's network: to offer state-of-the-art 911 services that will promote the public safety and welfare. Intrado Comm's interconnection request cannot be viewed in a vacuum. This is not simply another proceeding between an ILEC and a competitive local exchange carrier ("CLEC") with respect to interconnection for plain old telephone services ("POTS") as AT&T appears to admit. AT&T Initial Brief at 2. This proceeding is about interconnection arrangements to be established between Intrado Comm and AT&T that will permit Intrado Comm to provide competitive 911 services to PSAPs, the entities responsible for ensuring rapid, efficient response to Ohio consumers' requests for emergency assistance, as well as other types of 911 services. As the FCC has recognized, 911 service raises issues of public safety and policy considerations not present in typical interconnection arrangements. *See, e.g., Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶ 96 (2007) ("It is critical that Americans have access to a resilient and reliable 911 system irrespective of the technology used to provide the service.").

Contrary to AT&T's claim, *see* AT&T Initial Brief at 2, the determination in the *Arbitration Award* reflects the correct interpretation of federal law as well as an appropriate exercise of the PUCO's duty to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b); *see also VoIP E911 Order* ¶ 8 ("absent appropriate action by, and funding for, states and localities, there can

be no effective 911 services"); *Implementation of 911 Act, et al.*, 16 FCC Rcd 22264, ¶¶ 1, 7 (2001) (noting "the important role of States and localities in their continuing efforts to improve emergency service"). Specifically, as Intrado Comm will demonstrate herein:

- The PUCO previously determined in a separate proceeding that Intrado Comm offers telephone exchange service, and AT&T has therefore forfeited its opportunity to appeal that determination. *See infra* Section I.

- After undertaking an additional and independent analysis of Intrado Comm's 911 service, the PUCO properly applied federal law in determining that Intrado Comm's 911 service meets the definition of telephone exchange service as set forth in 47 U.S.C. § 153(47) and the FCC's orders interpreting that provision. Specifically, the PUCO correctly concluded that Intrado Comm's 911 service provides call origination, permits intercommunication, is offered in an exchange area for an exchange service charge, and is comparable to other telephone exchange services. *See infra* Section II.

- Based on federal law and record evidence demonstrating how 911 services are typically provided, the PUCO appropriately determined that the point of interconnection ("POI") should be located on Intrado Comm's network when Intrado Comm is the entity serving the PSAP to which the 911 call is directed. The PUCO's decision to consider all applicable law in making this decision was consistent with federal law and the authority provided to the PUCO under federal law. *See infra* Section III.

- The PUCO's decision to require the inclusion of PSAP-to-PSAP transfer arrangements in the parties' interconnection agreement was not arbitrary and capricious in light of federal law mandating interoperability between carriers and the PUCO's previous pronouncements on the subject. *See infra* Section IV.

- The PUCO did not violate federal law or the arbitrary and capricious standard in determining that Intrado Comm may be able to avail itself of certain rates under very limited circumstances. *See infra* Section V.

- The PUCO's decision to require the inclusion of contractual language regarding the ordering and pricing of interconnection arrangements in the parties' agreement was neither arbitrary and capricious nor contrary to federal law. *See infra* Section VI.

- Although the PUCO's findings were clearly correct and in accordance with law, the doctrine of primary jurisdiction dictates that this Court should defer review of these issues pending resolution by the FCC. *See infra* Section VII.

The *Arbitration Award* and *Entry on Rehearing* should therefore be upheld as consistent with federal law and the record evidence of the proceeding.

PROCEDURAL HISTORY

Recognizing the "significant public interest surrounding the provisioning of 9-1-1 service," the PUCO decided to create an additional certification category for carriers seeking to provide competitive 911 services to public safety entities in Ohio.[6] Thus, in Ohio, Intrado Comm is certified as both a competitive emergency services telecommunications carrier ("CESTC") and a CLEC.[7] Intrado Comm is therefore "entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act" as a CESTC, *see Certification Order* at 4-6, as well as through its CLEC certification.

In order for Intrado Comm to provide its services in Ohio, Intrado Comm must interconnect with ILECs like AT&T that control access to the public switched telephone network ("PSTN"), and consequently, access to the consumers who make 911 calls destined for Intrado Comm public safety customers and those Intrado Comm 911 calls destined for AT&T-served PSAP customers. Sections 251 and 252 of the Act were designed to promote competition by facilitating the interconnection of new entrants like Intrado Comm to the PSTN to ensure the interoperability of co-carrier networks.[8] Congress recognized that ILECs, such as AT&T, would have the incentive to thwart competition, and it therefore established the 251/252 negotiation and arbitration process, which conferred upon competitive carriers not only the right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. *See Local Competition Order* ¶ 15 (the "statute addresses this problem [of the incumbent's "superior bargaining power"] by creating an arbitration proceeding in

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[6] Ohio Case No. 07-1199-TP-ACE, *Application of Intrado Commc'ns Inc. to Provide Competitive Local Exchange Servs. in Ohio*, Finding and Order, at 6 (Feb. 5, 2008) ("*Certification Order*"), Entry on Rehearing (Apr. 2, 2008) ("*Certification Rehearing Order*") (Attachments 3 and 4).

[7] Ohio Case No. 08-1289-TP-ACE, *Application of Intrado Commc'ns Inc. to Provide Facilities-Based and Resold Competitive Local Exchange Co. Servs. within Ohio*, Grant of Certificate of Public Convenience and Necessity No. 90-9364 (Mar. 19, 2009). Intrado Comm is also certified as a CLEC in forty (40) other states.

[8] *See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 10 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

which the new entrant may assert certain rights"). Sections 251 and 252 of the Act are specifically designed to address the unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress's goal of increased competition. *See Local Competition Order* ¶ 134 (noting that "because it is the new entrant's objective to obtain services and access to facilities from the incumbent" and thus "has little to offer the incumbent in a negotiation," the Act creates an arbitration process to equalize this bargaining power).

In contrast to AT&T's self-serving claim that it offered "Intrado everything it needed to provide its competing service," *see* AT&T Initial Brief at 6, Intrado Comm was unable to negotiate a mutually beneficial interconnection agreement with AT&T and thus filed a petition for arbitration with the PUCO as contemplated by Section 252 of the Act. Throughout the arbitration proceeding, AT&T continued to challenge Intrado Comm's right to interconnection despite the PUCO's earlier findings in the *Certification Order* that Intrado Comm offered telephone exchange service and was entitled to interconnection pursuant to Section 251 and 252 of the Act.[9] *Certification Order* at Finding 7.

On March 4, 2009, the PUCO issued its *Arbitration Award* reaffirming its prior conclusions in the *Certification Order* regarding the classification of Intrado Comm's 911 services and resolving the outstanding contractual issues between the parties. The PUCO undertook a step-by-step analysis of the "telephone exchange service" definition found in the Act and the FCC's orders interpreting

[9] The PUCO has consistently upheld Intrado Comm's interconnection rights in the *Certification Order* (and on rehearing), in the *Arbitration Award* (and on rehearing), and in three (3) other arbitration proceedings with other ILECs (and on rehearing in each proceeding). *See, e.g.*, Ohio Case No. 07-1216-TP-ARB, *Petition of Intrado Commc'ns, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Tel. Co. of Ohio dba Embarq and United Tel. Co. of Ind. dba Embarq pursuant to Section 252(b) of the Telecomms. Act of 1996*, Arbitration Award (Sept. 24, 2008) ("*Embarq Arbitration Award*") (Attachment 5); Entry on Rehearing (Dec. 10, 2008) (Attachment 6); Ohio Case No. 08-537-TP-ARB, *Petition of Intrado Commc'ns Inc. for Arbitration pursuant to Section 252(b) of the Commc'ns Act of 1934, as Amended, to Establish an Interconnection Agreement with Cincinnati Bell Tel. Co.*, Arbitration Award (Oct. 8, 2008) ("*CBT Arbitration Award*") (Attachment 7), Entry on Rehearing (Jan. 14, 2009) ("*CBT Entry on Rehearing*") (Attachment 8); Ohio Case No. 08-198-TP-ARB, *Petition of Intrado Commc'ns Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Verizon N. Inc. pursuant to Section 252(b) of the Telecomms. Act of 1996*, Arbitration Award (June 24, 2009) ("*Verizon Arbitration Award*") (Attachment 9); Entry on Rehearing (Sept. 15, 2009) (Attachment 10).

that provision, and determined there was "sufficient evidence that Intrado's 911 service is telephone exchange service" based on federal law and the record evidence, which was consistent with its previous conclusions in the *Certification Order*. *See Arbitration Award* at 15; *see also Certification Order* at Finding 7. In response to a further challenge from AT&T, the PUCO subsequently upheld these determinations in its June 17, 2009 *Entry on Rehearing*. *See Entry on Rehearing* at 6-8.

STANDARD OF REVIEW

Federal review of a state public utilities commission decision focuses on the body's understanding and construction of the Act, rather than on its factual findings. Recognizing the "inherent logic" of splitting federal and state matters in a telecommunications proceeding between those bodies most competent to decide them, the Sixth Circuit has adopted "the bifurcated standard employed by the majority of other circuits." *Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 433 (6th Cir. 2003). Accordingly, federal courts in the Sixth Circuit conduct *de novo* review of a utility commission's interpretation of the Act, but apply an arbitrary and capricious standard to the commission's factual findings. *See, e.g., Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 354 (6th Cir. 2003).

ARGUMENT

I. THE PUCO'S FINDINGS IN THE *CERTIFICATION ORDER* FORECLOSE AT&T'S ARGUMENT THAT INTRADO COMM DOES NOT OFFER TELEPHONE EXCHANGE SERVICE ON THE GROUNDS OF RES JUDICATA, ESTOPPEL, AND WAIVER

AT&T arguments that Intrado Comm's 911 service does not constitute "telephone exchange service" under 47 U.S.C. § 153(47) are foreclosed by the PUCO's earlier *Certification Order*. In response to challenges from ILECs, including AT&T, the PUCO determined in the *Certification Order* that Intrado Comm is: (1) a "telecommunications carrier" offering "telecommunications service" under federal law; (2) a "telephone company" and a "public utility" under Ohio law; (3) a provider of "telephone exchange service" under federal law; and (4) a telecommunications carrier

entitled to all rights and obligations of Sections 251 and 252 of the Act. *Certification Order* at Finding 7.

AT&T took full advantage of its opportunity to challenge the PUCO's findings in the *Certification Order*. In AT&T's request for reconsideration of the *Certification Order*, AT&T contended that "[t]he question [as to] whether a certified CESTC also qualifies to seek an interconnection agreement under Sections 251 and 252 is an entirely separate question of federal law, unrelated to Ohio certification, that the Commission did not have to address, and therefore should not have addressed in a pure certification proceeding."[10] The PUCO, however, rejected AT&T's arguments and once again confirmed that Intrado Comm "is entitled to the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act." *Certification Rehearing Order* at 14. AT&T never appealed the PUCO's findings in the *Certification Order* or the *Certification Rehearing Order*.[11]

The equitable doctrines of res judicata,[12] waiver, and estoppel therefore prohibit AT&T from

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[10] Case No. 07-1199-TP-ACE, *Application of Intrado Commc'ns Inc. to Provide Competitive Local Exchange Servs. in the State of Ohio*, AT&T's Application for Rehearing and Request for Clarification, at 11 (filed Mar. 6, 2008) (Attachment 11).

[11] Under Ohio law, AT&T would have been required to file its appeal within sixty (60) days after issuance of the *Certification Rehearing Order*. *See* O.R.C. 4903.11, 4903.13; OHIO ADMIN. CODE § 4901-1-36.

[12] The equitable doctrine of res judicata embraces two subsidiary concepts: issue preclusion and claim preclusion. *See Migra v. Warren City School Dist. Bd. of Ed*., 465 U.S. 75, 77, n.1 (1984) (internal citations omitted). "Issue preclusion, or collateral estoppel, bars subsequent relitigation of a fact or issue where that fact or issue was necessarily adjudicated in a prior cause of action and the same fact or issue is presented in a subsequent suit. . . . Four specific requirements must be met before collateral estoppel may be applied to bar litigation of an issue: (1) the precise issue must have been raised and actually litigated in the prior proceedings; (2) the determination of the issue must have been necessary to the outcome of the prior proceedings; (3) the prior proceedings must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Cobbins v. Tenn. Dept. of Transp*., 566 F.3d 582, 589-90 (6th Cir. 2009) (internal citations omitted). Claim preclusion, on the other hand, "bars a subsequent action if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Becherer v. Merrill Lynch*., 193 F.3d 415, 422 (6th Cir. 1999) (citing *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir.1997)). As demonstrated, *supra*, AT&T vigorously contested the central issue of Intrado Comm's classification as a telephone exchange service before the PUCO in the certification proceeding that gave rise to the arbitration at issue, thereby foreclosing AT&T's claim that Intrado Comm should be denied the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act.

re-litigating before this Court arguments heard by the PUCO in the proceedings relating to the *Certification Order* and *Certification Rehearing Order* that were never appealed by AT&T in that case. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)). The doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Id.* at 94. While a federal court retains the right to inquire into decisions of a state commission pursuant to the Act, it may nonetheless deem particular claims subject to preclusion based on an earlier decision of that same commission. *See, e.g., BellSouth Telecomm., Inc. v. Ky. Pub. Serv. Comm'n*, 2008 WL 5173334 (E.D. Ky. 2008). Waiver and estoppel are also concerned with duplicative conduct - waiver forestalls a party's attempt to reclaim a right after voluntary relinquishment, while estoppel bars the repetition of conduct that misleads another to his prejudice. *See, e.g., Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 205 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

The *Certification Order* represented a valid final judgment as to Intrado Comm's right to avail itself of Sections 251 and 252 of the Act in dealings with AT&T.[13] *See Office of Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 16 Ohio St. 3d 9, 10 (1985). Despite AT&T's claims to the

[13] While the PUCO's *Certification Order* did "not address the appropriateness and scope of any specific request for interconnection," such as where the point of interconnection would be located, it did make clear that "Intrado is entitled to the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act" and that "ILECs are obligated to negotiate with Intrado in good faith" - the very issues that AT&T seeks to disprove in the matter at hand. *See Certification Rehearing Order* at 14. And though reliance on rulemaking proceedings is generally disallowed for purposes of res judicata, *see, e.g., Cincinnati Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 12 Ohio St.3d 280, 283 (1984), the PUCO made clear that its decision was not "tantamount to a rulemaking endeavor," despite AT&T's claims to the contrary during the proceeding before the PUCO. *See Certification Rehearing Order* at 6 ("Such a determination is certainly within the Commission's general supervisory powers. . . . To require the Commission to conduct a rulemaking every time a telephone company proposes a new and unique telecommunications service option would frustrate both the policy of the state to encourage innovation in the telecommunications industry as well as the policy to promote diversity and options in the supply of public telecommunications services and equipment throughout the state.") (internal citations omitted).

contrary, the *Certification Order* clearly stated that "competitive emergency telecommunications carriers," like Intrado Comm, "are telecommunications carriers pursuant to 47 U.S.C. 153." *Certification Order* at Finding 7. In its *Arbitration Award*, the PUCO made clear that it "had already generically addressed the issue of whether Intrado is engaged in the provision of telephone exchange services or exchange access service" in the *Certification Order* proceeding, and had already rejected attempts by another ILEC to "resurrect its arguments" in this regard in subsequent arbitration proceedings. *Arbitration Award* at 15.[14] Stating that it had already decided in "prior cases that Intrado provides telephone exchange service," the PUCO rightfully rejected AT&T's attempt to "reopen the issue" already decided by the PUCO in the *Certification Order* proceedings. *Id.*

Intrado Comm's rights and responsibilities under Sections 251 and 252 of the Act, and the classification of its 911 service as a telephone exchange service, were conclusively determined by the *Certification Order* after vigorous opposition by AT&T. AT&T is therefore barred from seeking to "appeal" or re-litigate those claims before this Court. Accordingly, Count I of AT&T's Amended Complaint should be dismissed.

II. THE PUCO CORRECTLY DETERMINED THAT INTRADO COMM'S 911 SERVICE CONSTITUTES "TELEPHONE EXCHANGE SERVICE" UNDER 47 U.S.C. § 153(47)

An analysis of the statutory definition of "telephone exchange service" depends on how a service is "implemented" and "the circumstances in which [it is] provided." *DA Call Completion Order*[15] ¶ 16; *Advanced Services Order*[16] at n.36. Recognizing AT&T's attempt to "carve out an exception" to the *Certification Order*, the PUCO repeated its analysis of Intrado Comm's 911 service

[14] The PUCO had twice before rejected other ILECs' attempts in other arbitration proceedings with Intrado Comm to "re-litigate" the PUCO's findings from the *Certification Order* proceedings. *See Embarq Arbitration Award* at 13; *CBT Arbitration Award* at 5-6.

[15] *Provision of Directory Listing Information under the Telecomms. Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001) ("*DA Call Completion Order*").

[16] *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385 (1999) ("*Advanced Services Order*").

under federal law and once again determined that Intrado Comm's 911 service qualifies as "telephone exchange service" under 47 U.S.C. § 153(47)[17] and the FCC's decisions interpreting that provision. *Arbitration Award* at 15; *see also Certification Order* at Finding 7. AT&T's Initial Brief demonstrates no reversible error in the PUCO's determination. When analyzing how Intrado Comm's 911 services are "implemented" and "provided" it is clear that Intrado Comm's 911 services permit call origination and intercommunication, and therefore meet the Act's definition of "telephone exchange service." 47 U.S.C. § 153(47).[18]

Struggling to surmount these formidable barriers, AT&T proffers an erroneous interpretation of Intrado Comm's service offering, and then argues the service does not constitute telephone exchange service under the Act. AT&T supports its arguments, in large measure, by cites to the decisions of public utilities commissions of other states, none of which bind this Court (and one of which, from the Public Utility Commission of Texas, was overturned in February 2010 as "improper" because it "was not based on any evidence").[19] Indeed, the large majority of the "evidence" proffered by AT&T is in the form of citations and quotations from Illinois and Florida decisions, which AT&T claims are based on "substantially identical testimony and arguments." AT&T Initial Brief at 14. AT&T provides no basis for this Court to view the interpretations of federal law espoused by Illinois and Florida more favorably than the interpretation put forth by the PUCO in the *Arbitration Award*. Contrary to AT&T's suggestion, *see* AT&T Initial Brief at 14, the

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[17] Under the statute, telephone exchange service "means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47).

[18] 47 U.S.C. § 153(47) is written in the disjunctive and satisfying only one prong of the definition (either Part (A) or Part (B)) will qualify a service as a telephone exchange service. *See Advanced Services Order* ¶ 17.

[19] Texas Docket No. 36176, *Petition of Intrado, Inc. for Compulsory Arbitration with Sw. Bell Tel. Co. d/b/a AT&T Tex. under the FTA Relating to the Establishment of an Interconnection Agreement*, Order on Motion for Reconsideration (Feb. 4, 2010) ("*Texas Reconsideration Order*") (granting Intrado Comm's motion for reconsideration and remanding case to arbitrators for development of an adequate evidentiary record) (Attachment 12).

Illinois and Florida decisions were based on the records developed in those proceedings, not the record evidence presented before the PUCO. The Illinois and Florida decisions therefore hold no precedential value in the Court's determination of whether the *Arbitration Award* is supported by federal law. *See, e.g., XO Commc'ns. Servs., Inc. v. Ohio Bell Tel. Co.*, 2008 WL 755863, at 7 (S.D. Ohio 2008) ("The fact that the state utility commissions in Michigan and Texas issued arbitration awards contemplating pre-CLEC self-certification of ILEC data does not prove dispositive or even persuasive here. . . . [as] they are readily distinguishable"); *Connect Commc'ns. Corp. v. Sw. Bell Tel., L.P.*, 467 F.3d 703, 713 (8th Cir. 2006) ("The interpretation of interconnection agreements rightly belongs to the state commissions, and we will not overturn one in favor of another without the showing of an arbitrary or capricious decision. Reasoned decisions reaching opposite conclusions do not *ipso facto* prove that either is arbitrary or capricious").

Moreover, while AT&T would like this Court to think that the "tally" of state commission decisions is in AT&T's favor (2 to 1 - Illinois and Florida versus Ohio), AT&T conveniently ignores the arbitration decision from the North Carolina Utilities Commission specifically finding that Intrado Comm is "a telecommunications carrier engaged in the provision of telephone exchange service pursuant to Section 251 of the Act."[20] After conducting an analysis of the statutory language, the relevant FCC decisions, the decisions issued in Florida, Illinois, and Ohio, and the record evidence, the North Carolina commission rejected AT&T's arguments, and held that "the services that Intrado seeks to provide are telephone exchange services for which AT&T is required, pursuant to Section 251(c) of the Act, to offer interconnection." *Id.* Thus, AT&T's "tally" of state commission decisions is 2-2. In reality, the tally is 8-2 in Intrado Comm's favor, given that Intrado

[20] North Carolina Docket P-1187, Sub 2, *Petition of Intrado Commc'ns Inc. for Arbitration Pursuant to Section. 252(b) of the Commc'ns Act of 1934, as Amended, with BellSouth Telecomms., Inc. d/b/a AT&T North Carolina*, Recommended Arbitration Order, at 14 (April 24, 2009) ("*North Carolina RAO*") (Attachment 13); *adopted and modified by*, Order Ruling on Objections and Requiring the Filing of a Composite Agreement (Sept. 10, 2009), *on appeal* Case 5:09-cv-00517-BR, *BellSouth Telecomms., Inc. d/b/a AT&T North Carolina v. Finley*, Complaint for Declaratory and Injunctive Relief (E.D.N.C. filed Dec. 2, 2009).

Comm has also been granted Section 251 interconnection in arbitrations with other ILECs in Ohio (Embarq, Cincinnati Bell, and Verizon), Maryland (Verizon), Massachusetts (Verizon), and West Virginia (Verizon).[21]

A. Intrado Comm's 911 Service Provides Call Origination

AT&T takes issue with the analysis conducted by the PUCO to determine whether Intrado Comm's 911 service provides for call origination. AT&T Initial Brief at 13. The *Arbitration Award*, however, provides no support for AT&T's arguments. AT&T claims the PUCO should have asked whether "the customer [can] originate a call using Intrado's 911 service?" AT&T Initial Brief at 13. But this is precisely the question the PUCO did ask. Consistent with the statutory language, the PUCO purposely reviewed whether "Intrado's PSAP customers can originate and terminate calls." *Arbitration Award* at 16. The PUCO specifically undertook a qualitative analysis and determined that Intrado Comm's 911 service allows for origination as contemplated by 47 U.S.C. § 153(47). *Arbitration Award* at 16. The PUCO noted that the existence of any amount of origination satisfies the statute because the quantity of origination is irrelevant, *see Arbitration Award* at 16, as AT&T itself argues. *See* AT&T Initial Brief at n.10.

As it did during the proceedings before the PUCO,[22] AT&T contests the significance of the 911 service's "hookflash" capability, but provides no support for its contentions. *See* AT&T Brief at 11. AT&T's understanding of "hookflash" and "call transfer" as synonyms is fundamentally incorrect. AT&T Initial Brief at 12, 14. When a PSAP receives a 911 call, hookflashing is *the means by which it obtains a dial tone to place a call* to a third party, via the central office serving as

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[21] *See, e.g., Embarq Arbitration Award*; *CBT Arbitration Award*; *Verizon Arbitration Award*; West Virginia Case No. 08-0298-T-PC, *Intrado Commc'ns Inc. and Verizon W. Va. Inc., Petition for Arbitration Pursuant to Section 252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5*, Arbitration Award (Nov. 14, 2008), approved by Commission Order (Dec. 16, 2008); Mass. D.T.C. 08-9, *Petition for Arbitration of an Interconnection Agreement between Intrado Commc'ns Inc. and Verizon New Eng. Inc. d/b/a Verizon Mass.*, Arbitration Order (May 8, 2009); Maryland Case No. 9138, *Petition of Intrado Commc'ns Inc. for Arbitration Pursuant to Section 252(b) of the Commc'ns Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon Md. Inc.*, Order (Dec. 15, 2009).

[22] *See, e.g.*, AT&T Ohio Post-Hearing Reply Brief at 5 (Record Index No. 27) (Attachment No. 14); AT&T Application for Rehearing at 4-8 (Record Index No. 38) (Attachment No. 15).

the 911 selective router. The third party is subsequently bridged to the original 911 caller, and the PSAP has the option of either disconnecting or remaining on the line to participate in the subsequent conversation. *See Telecommunications Relay Servs. and Speech-to-Speech Servs. for Individuals with Hearing and Speech Disabilities, et al.*, 18 FCC Rcd 12379, ¶ 73 (2003) ("*TRS Order*") (explaining the hookflash concept).[23] The PSAP's function in this regard is little different from call transfers in a typical office environment (in which an individual transferring a call obtains a dial tone to initiate a call to another party) or three-way calling (in which the individual responsible for conferencing obtains a dial tone to connect a third-party number). *See id.* ("After making or receiving the first connection, the TRS user presses the flash button to put the first person on hold and get a new dial signal. The TRS user then dials the third party's number."). The PUCO understood this hookflash capability and specifically concluded that "call transfers and conferencing involve call originating" via hookflash, enabling communication between a PSAP, a 911 caller, and a third party. *Arbitration Award* at 16; *see also DA Call Completion Order* ¶ 36. The PUCO further addressed this conclusion on rehearing finding that the hookflash capability allowed a PSAP "to receive dial tone to originate a call to an emergency service provider." *Entry on Rehearing* at 4.

AT&T's attempt selectively to cull bits of arbitration testimony to depict Intrado Comm witnesses as "admit[ting] that the hookflash capability does not give its subscribers the ability to originate or make a call" is simply inaccurate. AT&T Initial Brief at 13. When placed in context, these so-called "admissions" are anything but. Just two pages prior to AT&T's first cite, for example, Intrado Comm's witness provided the following testimony:

> Q: Now, transferring a call is not the same thing as originating a

[23] It is especially noteworthy that these statements regarding hookflash are made in the context of telecommunications relay service ("TRS"), which uses the abbreviated dialing code "711" to give users access to TRS, similar to the way in which the abbreviated dialing code "911" provides access to emergency services. *See Petition by the U.S. Dept. of Transp. for Assignment of an Abbreviated Dialing Code (N11) to Access Intelligent Transportation Sys. (ITS) Servs. Nationwide, et al.*, 15 FCC Rcd 16753, ¶ 1 (2000) ("N11 codes are abbreviated dialing arrangements that allow telephone users to connect with a particular node in the network by dialing only three digits.").

call; is that correct?

A: If you're doing the selective transfer you can – it is originating the call?

Q: So you're saying transferring a call is the same thing as originating a call.

A: *It can be, yes*.[24]

Similarly, AT&T's second cite (taken from an arbitration before the Florida commission) says nothing about the overall capability of Intrado Comm's PSAP customer to originate a call - it merely confirms that a call originated by the PSAP is not a re-origination of a call placed by a 911 caller. Moreover, as discussed above, AT&T's reliance on what transpired in other states should be rejected. The record *in this proceeding* is clear that Intrado Comm's 911 service allows for the origination of communications. Given the record in this proceeding and the FCC's own understanding of the hookflash capability as permitting the origination of a new call or dial tone, *see TRS Order* ¶ 73, AT&T's reliance on irrelevant and misinterpreted statements made in other arbitration proceedings should be given no weight.

AT&T's cites to Intrado Comm's tariff are similarly unavailing.[25] AT&T's arguments are based on a fallacious assumption that a PSAP's *reception* of a call originated by a 911 caller necessarily precludes *origination of a subsequent call* by that same PSAP. Call origination is *not* a zero-sum game, where Intrado Comm is forced to demonstrate how a "single call could be originated twice" in order to prove its point. AT&T Initial Brief at 12. As just explained, when a PSAP receives a call placed by a 911 caller, it transfers it by making a *second* call to a third party, such as

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[24] Vol II. Tr. at 121 (emphasis added) (Record Index No. 23) (Attachment No. 16).

[25] AT&T's reliance on the terms and conditions in Intrado Comm's tariff as somehow representing the absolute boundaries of Intrado Comm's services is also wrong. Tariffs are not finite. They can be revised, changed, and modified at any time, and do not necessarily reflect all of a company's services for all time. *See, e.g., Implementation of the Telecomm. Act of 1996, et al.*, 14 FCC Rcd 14409, ¶ 28 (1999) (recognizing that carriers will introduce new and improved services and products in a competitive market); *see also* OHIO ADMIN. CODE § 4901:1-6-04, 1-6-05 (providing for zero-day to 30-day notice periods for tariff changes depending on the service at issue).

another PSAP or first responder, and then links all the parties together, pending its own disconnection or further participation. Thus, the reference in Intrado Comm's tariff to adding an "additional party" to an "existing call" is properly understood as the addition of the *911 caller* to a call *placed by the PSAP* to a third party. *See TRS Order* ¶ 73.

AT&T further alleges that an Intrado Comm PSAP customer is forced to "wait to *receive* a 911 call before it can do anything. . . . and even then the PSAP is limited to transferring that existing 911 call, if necessary, to a predetermined point." AT&T Initial Brief at 13 (emphasis in original). These criticisms are patently absurd - a PSAP is only "limited" inasmuch as it has been designed, and so designated under Ohio law,[26] to serve as a clearinghouse for emergency calls, routing them to the closest and most appropriate emergency response services.[27]

B. Intrado Comm's 911 Service Provides Intercommunication

AT&T criticizes the PUCO for having "created its own definition" of intercommunication, *see* AT&T Initial Brief at 15, but the PUCO did nothing of the sort. Rather, the PUCO precisely tracked the FCC's definition of intercommunication in concluding that Intrado Comm's 911 service meets that definition.[28] *See Advanced Services Order* ¶ 30 (the ability of a communication service to

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[26] OHIO ADMIN. CODE § 4931.40(P) (defining "public safety answering point" as "a facility to which 9-1-1 system calls for a specific territory are initially routed for response and where personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider, or transferring the call to the appropriate provider"); OHIO ADMIN. CODE § 4931.41(I) (instructing PSAP personnel who "reasonably determine that a 9-1-1 call is not an emergency" to "provide the caller with the telephone number of an appropriate subdivision agency as applicable").

[27] AT&T also engages in a protracted discussion of how the PUCO's consideration of "reverse 911" service and subsequent reliance upon it "is arbitrary and capricious and violates due process." AT&T Initial Brief at 15, n. 12. As AT&T admits, the PUCO took "administrative notice" of Intrado Comm's tariff amendment to incorporate reverse 911 service, and clearly stated that it was "not necessary for [its] determination" that Intrado Comm provides telephone exchange service. *Id*.; *Entry on Rehearing* at 7-8. It is well established that agencies may take administrative notice of and rely upon certain facts that are otherwise outside of the record. *See FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978). The PUCO's own admission that its administrative notice of Intrado Comm's reverse 911 service was "not necessary for [its] determination" is reason alone to reject AT&T's arguments. Nor can AT&T claim a "due process" violation when Intrado Comm was ordered to provide this service in the proceedings leading up to the *Certification Order*, which AT&T participated in and chose not to appeal. *See Certification Order* at Finding 16.

[28] AT&T's attempts to equate the depth of the PUCO's reasoning with the number of references to a particular case - in this instance, the *DA Call Completion Order* - runs contrary to well-settled federal precedent, wherein an

"intercommunicate" is "key component" of telephone exchange service); *id.*¶ 23 (intercommunication is established when a service "permits a community of interconnected customers to make calls to one another over a switched network").

First, the PUCO found that "intercommunication exists where PSAPs and 911 callers can transmit and receive messages using the same facilities." *Entry on Rehearing* at 7. As the PUCO determined, Intrado Comm's 911 service permits intercommunication by virtue of its being capable of two-way *communication*, even if it does not always carry two-way *traffic*. The key consideration under federal law is whether there is two-way communications, not two-way traffic. *Advanced Service Order* ¶ 20. Indeed, the FCC has "nowhere suggested that two-way voice service is a necessary component of telephone exchange service." *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, et al.*, 13 FCC Rcd 24011, ¶ 43 (1998) (subsequent history omitted).

Second, the PUCO observed that "PSAPs can intercommunicate, in the more traditional sense, with certain other PSAPs and emergency service providers." *Entry on Rehearing* at 7. This fulfills the FCC's and AT&T's understanding of an intercommunicating service as one that "must enable the subscriber to make calls to 'all subscribers.'" AT&T Initial Brief at 16, 18 (*citing Advanced Services Order* ¶¶ 20, 23-26, n.61; *DA Call Completion Order* ¶¶ 17, 21-22). AT&T's criticism of 911 callers' inability to make calls using the 911 service is therefore unavailing. The PUCO's analysis parallels the FCC's own understanding of how services satisfy the intercommunication requirement as explained in its analysis of xDSL-based advanced service - "although a customer must designate the [internet service provider] ISP or third party to whom his or her high-speed data transmissions are directed" (in the same way that a PSAP waits for a 911 call before originating a subsequent call to a first responder or other PSAP), "once on the packet-

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adjudicatory body may apply the holding of a particular case without referencing it by name. *See, e.g., Fargo v. Phillips*, 58 Fed. Appx. 603, 606 (6th Cir. 2003); *Miller v. Straub*, 299 F.3d 570, 578 (6th Cir. 2002).

switched network, *a customer may rearrange the service to communicate with any other subscriber located on that network* through the use of packet-switching technology." *DA Call Completion Order* ¶ 24 (emphasis added). There is consequently no significance to AT&T's claim that the 911 service's intercommunicative abilities, in a community of interconnected subscribers, is compromised by the need for a 911 caller to make "a call to the PSAP using another carrier's service."[29] AT&T Initial Brief at 16, n. 13.

AT&T's labored analogies to private line service, and the 911 service's alleged limitations in connecting to "specific, predetermined points" are also inapplicable. AT&T Initial Brief at 16-17. Per the FCC's understanding and application of private line service in the intercommunicative context, there is no "predesignated transmission path" or facility "set aside for the exclusive use or availability" of the 911 customer to reach the PSAP, both of which are required for a service to be classified as a private line service.[30] *Advanced Services Order* ¶ 25. Consistent with these FCC statements, the PUCO took "into account the network architecture of Intrado" and correctly determined that Intrado Comm's 911 service permits a PSAP to receive calls from multiple locations and 911 callers, in sharp contrast to a dedicated point-to-point private line service. *See Entry on Rehearing* at 7.

C. Intrado Comm's 911 Service Fulfills the Requirements that the Service Be "Within a Telephone Exchange, or Within a Connected System of Telephone Exchanges Within the Same Exchange Area" and Covered by the Exchange Service Charge

AT&T admits that it "may be true" that Intrado Comm's 911 service area "does not have to match the ILEC's" for purposes of 47 U.S.C. § 153(47). AT&T Initial Brief at 18, *accord* AT&T

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[29] Such a criticism bespeaks a fundamental misunderstanding of the purpose of a dedicated emergency communications system. *See* OHIO ADMIN. CODE § 4931.40(A) (defining "9-1-1" as "a system *through which individuals can request* emergency service using the telephone number 9-1-1") (emphasis added)).

[30] Nor is there any merit to AT&T's depiction of Intrado Comm's 911 service as a mere "hub-and-spoke arrangement" (AT&T Initial Brief at 17) - as noted in the preceding section, call transfers or conferencing permit a PSAPs purposeful use of call origination amongst a host of other PSAPs, first responders, and emergency agencies, per the 911 caller's unique needs.

Application for Rehearing at 11 (Record Index No. 38) (Attachment No. 15). AT&T's admission, however grudging, is both accurate and valid in the context of emergency calling. The 911 service's geographical area is tailored to fulfill the basic purpose of 911 calling - to link an individual in distress with the closest appropriate emergency assistance authorities. *See Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 20105, ¶¶ 2-3 (2007). Local calling areas, drawn from the vagaries of ILEC monopoly infrastructure development, frequently fail to fulfill this need. A fire engine from two towns over, for example, may be a local call according to a customer's basic telephone service, but would arrive too late to extinguish a spreading blaze.[31] Ohio law recognizes this fact, and has structured PSAP service areas to save lives, not mirror ILEC-defined exchange service areas.[32] Several federal authorities have made the same point.[33]

AT&T takes an impermissibly narrow view of the "equivalent of a local exchange area." AT&T Initial Brief at 19. A local telephone exchange "is based on geography and regulation," not exchange boundaries drawn to define telephone company service areas. *Advanced Services Order* ¶

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[31] Indiana Cause No. 43499, *Joint Complaint of Commc'ns Venture Corporation d/b/a INDigital Telecom, et al*, Final Order, at 15 (Feb. 10, 2010) ("*Indiana 9-1-1 Order*") (Attachment 21) (explaining potential interconnection between Intrado Comm in Ohio and INdigital Telecom in Indiana, per parties' recognition "that as wireless sites or sectors commonly overlap state boundaries . . . there will be a need for Intrado-served PSAPs and INdigital-served PSAPs to transfer 911 calls in both directions between their respective PSAPs"), *notice of appeal filed* Case No. 93A02-1003-EX-284, *Ind. Bell Tel. Co. v. Ind. Reg. Comm'n* (Ind. Ct. App. filed Mar. 12, 2010).

[32] *See, e.g.*, OHIO ADMIN. CODE § 4931.40(D) ("Enhanced wireline 9-1-1" means a 9-1-1 system in which the wireline telephone network, in providing wireline 9-1-1, automatically routes the call to *emergency service providers that serve the location from which the call is made* and immediately provides to personnel answering the 9-1-1 call information on the location and the telephone number from which the call is being made") (emphasis added); OHIO ADMIN. CODE § 4931.41(A)(1) ("A countywide 9-1-1 system shall include all of the territory of the townships and municipal corporations in the county and any portion of such a municipal corporation that extends into an adjacent county"); *see also* OHIO ADMIN. CODE § 4931.40(P) (defining "public safety answering point").

[33] *Bell Operating Companies: Petitions for Forbearance from the Application of Section 272 of the Commc'ns Act of 1934, as amended, to Certain Activities*, 13 FCC Rcd 2627, ¶ 9, 20 (1998) (recognizing that 911 selective routers often serve 911 callers and PSAPs in more than one local access and transport area ("LATA")); *United States* v. *Western Elec. Co.*, Civil Action No. 82-0192, Misc. No. 82-0025 (PI), slip op. at 5, n.8 (D.D.C. Feb. 6, 1984) (waiving LATA restrictions to ensure that the Bell Operating Companies ("BOCs") could "provide, using their own facilities, 911 emergency service across [local access telephone area] boundaries to any 911 customer whose jurisdiction crosses a LATA boundary"). The *Western Elec. Co.* holding permitted "the BOCs to provide multiLATA 911 services, including E911 services." Letter from Constance E. Robinson, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, to Alan F. Ciamporcero, Pacific Telesis Group, I (Mar. 27, 1991).

22. The FCC has conclusively determined that the telephone exchange service definition "does not require a specific geographic boundary." *Application of BellSouth Corp., BellSouth Telecomms., Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in La.*, 13 FCC Rcd 20599, ¶ 30 (1998) ("*BellSouth Louisiana II Order*"). Moreover, the statutory definition "demonstrates that the Congress has authorized the [FCC] to characterize as 'exchange service' even services that do not use exchanges." *GTE Service Corp. v. FCC*, 224 F.3d 768, 774-75 (D.C. Cir. 2000). This can be witnessed, for example, in wireless providers' geographic service areas, which differ from conventional wireline exchange area boundaries but are nonetheless considered to be "within a telephone exchange" or "a connected system of telephone exchanges within the same exchange area" for purposes of the Act's definition of "telephone exchange service." *BellSouth Louisiana II Order* ¶ 30. The PUCO correctly determined based on these concepts that Intrado Comm's service, which interconnects 911 callers, PSAPs, and first responders in the same geographic area, fulfills the FCC's criteria as well. *See Arbitration Award* at 15-16. By using a "means of communicating information within a local area" and "a central switching complex which interconnects all subscribers within a geographic area," Intrado Comm's 911 service qualifies as telephone exchange service similar to the way in which other services have been found by the FCC to meet the definition.[34] *Advanced Services Order* ¶ 17; *BellSouth Louisiana II Order* ¶ 28.

In addition, Intrado Comm's service is "covered by the exchange service charge" as required under 47 U.S.C. § 153(47). AT&T's reasoning that because Intrado Comm does not offer telephone exchange service it cannot satisfy the requirement for an "exchange service charge" is circular.

[34] AT&T attempts to contest the 911 service's ability to meet the "exchange-area requirements" by claiming that the intersection of 911 callers, PSAPs, and emergency service personnel within a single county cannot be likened to a telephone exchange. AT&T Initial Brief at 18-19. As Intrado Comm demonstrated in the preceding section, the putative requirement that "everyone within [an] 'exchange'" must be able "to call everyone else in that 'exchange'" is misapplied in this instance. AT&T Initial Brief at 19. Within Intrado Comm's service area, the FCC's understanding of "telephone exchange service" is satisfied by intercommunication in the form of two-way communication amongst 911 callers, PSAPs, and first responders, and calling between and among PSAP subscribers. *See supra* Section II.B; *Advanced Services Order* ¶ 20.

AT&T Initial Brief at 18. Whether an "exchange service charge" exists is an element of the statutory definition of "telephone exchange service" - there cannot be a requirement that you provide telephone exchange service in order to satisfy an element of the definition. Such an interpretation would render the elements of the definition meaningless. *See, e.g.*, *Fifth Generation Computer Corp. v. Internat'l Bus. Mach. Corp*., No. 09-CV-2439, 2010 WL 26542, at 15 (S.D.N.Y. Jan. 6, 2010) (rejecting plaintiff's construction of disputed term as facially "circular and confusing, as it uses the term 'bus controller' in the definition of the same"); *see also Automated Bus. Cos. v. ENC Tech. Corp*., 2009 WL 3190448, at 20 (S.D. Tex. 2009). The FCC has specifically found that, "in a competitive environment, where there are multiple local service providers and multiple services, there will be no single 'exchange service charge.'" *Advanced Services Order* ¶ 28. The only requirement is that Intrado Comm's customers obtain "the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with" Intrado Comm. *Advanced Services Order* ¶ 27. As the PUCO concluded, *see Arbitration Award* at 16, the evidence of an exchange service charge is found in the fees paid to Intrado Comm by its customers, (*i.e.*, PSAP customers, enterprise, and telematics customers, and, if a 911 access service tariff is filed, for service providers).

D. Intrado Comm's 911 Service Is Comparable to Other Non-Traditional Communications Services that Meet the Definition of Telephone Exchange Service

AT&T claims that Intrado Comm's 911 service must be "comparable" to xDSL service to meet this prong of the telephone exchange service definition. AT&T Brief at 19-20. AT&T is wrong. DSL services and other services previously classified by the FCC as telephone exchange services do not define the characteristics of a "telephone exchange service" by which all other services are to be measured.[35] Rather, these services are merely examples of the application of the

[35] As the FCC has explained, 47 U.S.C. § 251(c)(2) was intended by Congress to prevent long-distance carriers from seeking Section 251(c) interconnection in order to avoid access charges. *See Local Competition Order* ¶ 87. It

statutory criteria to a particular service. *See Advanced Services Order* ¶ 29 (while the term "comparable" is not defined in the Act, it is generally understood to mean "having enough like characteristics and qualities to make comparison appropriate"). The PUCO correctly applied FCC precedent by undertaking an independent analysis based on the elements in the statutory definition as implemented by the FCC and applying those elements to the specific facts of Intrado Comm's 911 service offerings. *See BellSouth Louisiana II Order* ¶ 29 (adopting "a practical approach to applying [the "telephone exchange service"] definition" given "the evolving nature of the provision of services in the telecommunications market").

III. THE PUCO PROPERLY IMPLEMENTED INTERCONNECTION REQUIREMENTS PURSUANT TO FEDERAL LAW

The PUCO's order requiring AT&T to establish a POI on Intrado Comm's network for delivery of 911 calls to PSAPs served by Intrado Comm is neither "odd" nor "unprecedented," AT&T Initial Brief at 21-22, but rather is compelled by federal law, PUCO precedent, and the well-established ability of a hearing body to utilize any applicable law in rendering its decision.

Federal law requires ILECs to provide interconnection that is at least equal in type, quality, and price to the interconnection arrangements the ILEC provides to itself or others to ensure effective local competition emerged. S. Rep. No. 104-23, at 20 (1995); 47 U.S.C. § 251(c)(2)(C); 47 C.F.R. § 51.305(a)(3). The FCC thus determined that "section 251(c)(2)(C) interconnection that is 'at least' equal in quality to that enjoyed by the ILEC itself" was the "minimum requirement." *Local Competition Order* ¶ 225. As the record evidence before the PUCO demonstrated, AT&T has developed interconnection arrangements under which competitive carriers deliver their 911 calls to AT&T's selective routers for termination to AT&T's PSAP customers and deliver all other calls to

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was not intended to be a litmus test, screening out all but the most traditional forms of communication. *See Advanced Services Order* ¶ 26. The term "telephone exchange service" must therefore be construed broadly in light of evolving voice and data technologies if the pro-competitive purpose of the Act is to be achieved. *Id.* ¶ 21.

another point for termination to non-PSAP customers.[36] *See* AT&T Hearing Exhibit 3 (Record Index No. 53) (Attachment 17); Volume II Tr. 93, 97 (Record Index No. 23) (Attachment 16).

AT&T's network arrangements are consistent with FCC determinations. For 911 calls, the FCC has determined that that the "cost-allocation point" for the exchange of 911 traffic should be at the selective router. *Revision of the Comm'n's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys., Request of King County*, 17 FCC Rcd 14789, ¶ 1 (2002) ("*King County Order*"). This decision was based on "the nature and configuration of the existing network components used to provide wireline E911 service" and input from PSAPs that asserted the selective router was the appropriate demarcation point for allocating responsibility and associated costs between carriers. *King County Order* ¶ 4, n.4. Although the finding resulted in "a cost allocation point beyond" the carrier's switch, the FCC nevertheless found it was appropriate and consistent with industry practice. *King County Order* ¶ 11. Thus, the FCC determined that, when a 911 call is made, the carrier must bring the 911 call, as well as the information about the caller (*i.e.*, the caller's phone number and location) to the 911/E-911 network for processing, and specifically, to the equipment that analyzes and distributes the call - the 911 selective router serving the PSAP. *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Marlys R. Davis, E911 Program Manager, Department of Information and Administrative Services, King County, Washington, WT Docket No. 94-102 (rel. May 7, 2001). Indeed, AT&T's own witness admitted that the FCC has made this determination and that it should govern the establishment of 911 interconnection arrangements. *See* Volume II Tr. at 91 ("which I reference in my testimony that King County ruling said, not in so many word, but they did come to something that comes close to saying the proper demarcation point, which in some words is the same as a POI, is the selective router") (Record Index No. 23) (Attachment No. 16).

[36] Thus, there is no merit to AT&T's claim that it mutually exchanges all traffic with competitors at a single location. AT&T Initial Brief at 26.

Based on the FCC's requirements for 911 traffic and the way in which AT&T engineers its network for the exchange of 911 traffic, the PUCO determined that the POI should be at the selective router of the 911 network provider to which the 911 call is destined. *Arbitration Award* at 34. Thus, when AT&T is displaced by Intrado Comm as the PSAP's designated 911 service provider, AT&T becomes just another local exchange carrier with an obligation to send its subscribers' 911 calls to Intrado Comm PSAP customers, and AT&T is therefore responsible for delivering those 911 calls to an Intrado Comm selective router location. The PUCO correctly recognized, however, that it could not rely on Section 251(c) of the Act to make this determination given that provision's insistence that the interconnection point be placed on the incumbent carrier's network.[37] 47 U.S.C. § 251(c)(2)(B); *Arbitration Award* at 34; *Entry on Rehearing* at 19. Instead, the PUCO exercised its authority to apply all applicable law in its decision making process, including the application of Section 251(a). *Arbitration Award* at 34; *Entry on Rehearing* at 18.

Specifically, Section 251(a) of the Act requires all telecommunications carriers to interconnect with all other telecommunications carriers. 47 U.S.C. § 251(a). As the FCC has explained, Sections 251(a) through 251(c) create a three-tiered hierarchy of escalating obligations based on the type of carrier involved," with "Section 251(a) impos[ing] [a] relatively limited duties *on all telecommunications carriers*. . . . [and] section 251(c) impos[ing] the most extensive duties on [carriers] that are incumbent [carriers]." *Guam Pub. Util. Comm'n*, 12 FCC Rcd 6925, ¶ 19 (1997) (emphasis added); *see also, e.g., Verizon N. Inc. v. Strand*, 367 F.3d 577, 581, 582 (6th Cir. 2004). Thus, Section 251(a) neither imposes an "additional, more onerous interconnection duty" on AT&T.[38] *Cf.* AT&T Initial Brief at 29.

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[37] AT&T is correct that Intrado Comm had originally argued *in prior arbitration proceedings* that 251(a) should not apply. AT&T Initial Brief at 27. But after twice being rejected by the PUCO in the Embarq and Cincinnati Bell arbitrations (which occurred before the AT&T arbitration proceeding), Intrado Comm never made those arguments in its arbitration proceeding with AT&T before the PUCO as AT&T itself recognizes. AT&T Initial Brief at 27.

[38] AT&T cites *Guam* for the proposition that "'[t]he express language and structure of section 251 compel rejection of any approach' that would use one subsection of Section 251to impose duties on a type of carrier that is

Thus, consistent with its overarching authority over 911 services and the "significant public interest," the PUCO properly employed all "applicable law" to ensure "the provisioning of uninterrupted emergency 9-1-1 service in the state of Ohio." *Embarq Arbitration Award* at 15; *see also Arbitration Award* at 34 (citing prior decisions). This "applicable law" includes the FCC's *King County Order* and Section 251(a) of the Act, as well as the PUCO's general jurisdiction to address 911 and interconnection issues pursuant to state and federal law. AT&T is therefore wrong when it claims the PUCO could not employ Section 251(a) (or any other applicable law) in reaching the decisions found in the *Arbitration Award*. AT&T Initial Brief at 22. There is no question that federal and state law permit the PUCO to apply all applicable law to its decision making process.[39] *See, e.g., Painter v. Shalala*, 97 F.3d 1351, 1359 (10th Cir. 1996) ("when faced with a proper case or controversy, courts, both state and federal, must apply all applicable laws in rendering their decisions"); *Young v. Blueshield*, No. C07-2008RSL, 2008 WL 4585260, at 2 (W.D. Wash. Oct. 14, 2008) ("Courts do not err in applying applicable law, even if the parties fail to address it themselves.").

The PUCO's plenary "arbitration and enforcement authority over all Section 251 agreements" further supports its POI determination, *see Arbitration Award* at 16, despite AT&T's claims to the contrary.[40] AT&T Initial Brief at 31. The PUCO is specifically empowered by the Act

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not subject to any subsection, since that 'would contravene the carefully-calibrated regulatory regime crafted by Congress.'" AT&T Initial Brief at 29. However, AT&T fails to disclose that the *Guam* holding arose from unique circumstances - namely, a petition that the "general duties of interconnection under section 251(a)(1) and of resale under section 251(b)(1) are equivalent to the specific duties of interconnection and resale delineated in section 251(c)." *Guam* ¶ 19. No such claim has been advanced here. AT&T also improperly extends the FCC's words to apply to Section 251 in general, when in fact they addressed only "impos[ition] [of] the section 251(c) obligations on a carrier that is not an incumbent LEC." *Id.*

[39] *See, e.g., Contractor Industries v. Zerr*, 241 Pa. Super. 92, 107, n.6 (1976) (relying on the Uniform Commercial Code despite the fact that "neither party has argued that the applicable law in the instant case is embodied in the Uniform Commercial Code"); *Pittsburgh's Ordinance Imposing Time Limits for Crossing Blocking and Speed Restrictions Invalidated to the Extent that It Attempts to Regulate Matters within Primary Jurisdiction of the Comm'n*, 1974 Cal. PUC LEXIS 1491, at 6 (1974) ("Moreover the Commission not only has the power, but it has the duty, to apply applicable law to the facts of a proceeding before it.") (citing *Northern Cal. Power Agency v Pub. Utils. Comm'n.*, 5 Cal 3d 370 (1971); *People v W. Airlines, Inc.*, 42 Cal.2d 621, 630-33 (1954)).

[40] AT&T cites *Sprint Comm. Co. L.P. v. Pub. Util. Comm'n of Tex.*, 2006 WL 4872346, at 5, n. 4 (W.D.Tex.

to address matters concerning the implementation of interconnection agreements. *See, e.g., AT&T Corp.*, 525 U.S. at 385 (finding that Section 252 of the Act entrusts state commissions jurisdiction over interconnection agreements); *Southwestern Bell Tel. Co. v. Waller Creek Comm., Inc*., 221 F.3d 812, 814 (5th Cir. 2000). A state's authority has been consistently recognized by the FCC and the courts in regards to interconnection negotiation, arbitration, interpretation, and enforcement.[41] Indeed, numerous federal and state decisions provide support for the PUCO's determination that it has authority to arbitrate and oversee all Section 251 interconnection agreements,[42] not just those pertaining to Section 251(c).[43]

2006) for the claim that neither Section 251(a) nor Section 251(b) give rise to an independent duty to negotiate. Initial Brief at 31. AT&T proffers this quotation without context - the subject telecommunications carrier in the *Sprint* case was a "rural telephone company exempt from § 251(c)(1)'s duty to negotiate." *Id*. No such exemption applies to Intrado Comm or AT&T. Moreover, 251(a) clearly establishes a duty to interconnect, and when the interconnection is for the provision of 911 services, the POI must be at the selective router of the 911 service provider for the PSAP to which the call is destined. *See King County Order* ¶ 1.

[41] *See, e.g., Local Competition Order* ¶ 137 ("State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251."); *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, ¶ 53 (2005) (stating that "the Supreme Court has recognized" that Sections 251 and 252 "contemplate a federal-state partnership in the development of competition in the local exchange market"); *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002) (noting that it is "the state agency's responsibility to make a determination – that is, to mediate, to arbitrate, to approve, and (possibly) to interpret and enforce an interconnection agreement").

[42] Indiana Cause No. 43052-INT-01, *Sprint Commc'ns Co. L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Commc'ns Act of 1934, as Amended by the Telecomms. Act of 1996, and the Applicable State Laws for Rates Terms and Conditions of Interconnection with Ligonier Telephone Co., Inc*., Opinion (Sept. 6, 2006) (agreeing that Section 251(a) issues may be included in a Section 252 arbitration proceeding); North Dakota Case No. PU-2065-02-465, *Level 3 Commc'ns LLC Interconnection Arbitration Application*, Order (May 30, 2003) (finding the arbitration provisions of Section 252 are available for all Section 251 interconnections, including interconnections under Section 251(a)); Washington Docket No. UT-023043, *Petition for Arbitration of an Interconnection Agreement Between Level 3 Commc'ns, LLC and CenturyTel of Wash., Inc. Pursuant to 47 U.S.C. Section 252*, Seventh Supplemental Order, ¶ 17 (Feb 28, 2003) ("[T]he mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a)."). (internal citations omitted).

[43] *See* California Decision 06-08-029, *Application by Pac. Bell Tel. Co. d/b/a SBC Cal. for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Servs. LLC Pursuant to Section 252(b) of the Telecomms. Act of 1996*, Opinion Approving Arbitrated Interconnection Agreement as Amended, at 10 (Aug. 24, 2006) ("An indirect interconnection right is given to each CLEC that the ILEC by itself deny or vacate. The ILEC has the duty to negotiate the provision of interconnection, including indirect interconnection, and if negotiations fail, it may be arbitrated."); Illinois Docket Nos. 05-0259, *et al., Cambridge Telephone Co., et al. Petitions for Declaratory Ruling and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Fed. Telecomms. Act, pursuant to Section 251(f)(2) of that Act; and for Any Other Necessary or Appropriate Relief*, Order at 13 (July 13, 2005) (finding that Sprint was entitled to interconnection under Section 251(a) and arbitrating those interconnection agreements); *rehearing and reconsideration denied*, Notice of Commission Action (Aug. 26, 2005); *aff'd Harrisonville Tel. Co v. Ill. Commerce Comm'n*, Civil No. 06-73-GPM, Memorandum Opinion and Order (S.D. Ill. Sept. 5, 2007); Iowa Docket No. ARB-05-2, *Sprint Commc'ns Co. L.P. v. Ace*

Further, the PUCO's actions do not run afoul of Section 252(b)(2) as AT&T contends. AT&T Initial Brief at 22. AT&T's arguments confuse a party's right to raise issues under Section 252(b)(2) of the Act with the PUCO's right to apply all applicable law. Section 252(b)(2) states that a state commission cannot consider issues that were not raised by the parties to the arbitration. 47 U.S.C. § 252(b)(2); *U.S.W. Commc'ns, Inc. v. Minn. Pub. Utils. Comm'n.*, 55 F. Supp. 2d 968, 976-77 (D. Minn. 1999) (finding that 252(b)(4)(A) "indicates that the [state commission] cannot independently raise an issue not raised by one of the parties"). The issue raised by the parties pursuant to Section 252(b)(2) was where the POI should be located, and the parties vigorously argued whether 251(a) or 251(c) should govern that decision. Indeed, while AT&T claims that Section 251(a) was not "at issue" in this proceeding, *see* AT&T Initial Brief at 22, AT&T's own words in the proceedings before the PUCO belie that notion. AT&T discussed the application of Section 251(a) at length in its briefs, and the potential application of 251(a) was specifically discussed by both parties at the arbitration hearing held before the PUCO.[44] The requirements of Section 252(b)(2) have no bearing on the PUCO's decision to apply Section 251(a) when deciding the issue presented by the parties regarding the location of the POI.

Finally, PUCO precedent demonstrates the soundness of its approach. In previous decisions, the PUCO invoked both Sections 251(a) and 251(c) to guarantee Intrado Comm's ability to interconnect in a manner that recognized the public safety considerations associated with the provision of competitive 911 services.[45] On multiple prior occasions, the PUCO explained its

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Commc'ns Group, et al., Arbitration Order (Mar. 24, 2006) (finding rural carriers must interconnect with Sprint pursuant to Section 251(a) and arbitrating those interconnection agreements); New York Cases 05-C-0170, 05-C-0183, *Petition of Sprint Commc'ns Co. L.P., Pursuant to Section 252(b) of the Telecomms. Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies, et al.*, Order Resolving Arbitration Issues (May 24, 2005) (finding that Sprint was entitled to interconnection under Section 251(a) and arbitrating those interconnection agreements); Order Denying Rehearing (Aug. 24, 2005), *aff'd Berkshire Tel. Corp., et al. v. Sprint Comm. Co. L.P.*, 2006 U.S. Dist. LEXIS 78924 (W.D.N.Y. Oct. 30, 2006).

[44] AT&T's Initial Post-Hearing Brief at 13-17, 30-34 (Record Index No. 25) (Attachment No. 18); Vol. I. Tr. at 51 (Record Index No. 54) (Attachment No. 19); Vol. II Tr. at 58-59, 88 (Record Index No. 23) (Attachment No. 16).

[45] The PUCO's decision to establish the POI at the selective router serving the PSAP was also consistent with the

authority to arbitrate and oversee all Section 251 interconnection agreements, not just those limited to Section 251(c). *See Embarq Arbitration Award* at 15 (finding the provisions of Section 252 "encompass all Section 251 interconnection agreements, and not just those pertaining to Section 251(c) of the Act"); *CBT Entry on Rehearing* at 11 ("The Commission agrees with Intrado that a state commission can use its Section 252 arbitration and enforcement authority over all Section 251 agreements."); *compare Indiana 9-1-1 Order* at 40 ("While INdigital has not requested interconnection [with AT&T] under § 251(c), we have found that 47 U.S.C. §251 applies."). AT&T has provided no legal basis for the PUCO to have reversed course in this arbitration proceeding and the PUCO had four (4) proceedings with eight (8) separate opportunities (including rehearings) to review the underpinnings of its legal findings. *See, e.g.*, *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986).[46]

IV. THE PUCO PROPERLY ORDERED PSAP-TO-PSAP TRANSFER ARRANGEMENTS TO BE INCLUDED IN THE PARTIES' INTERCONNECTION AGREEMENT

AT&T insists that the PUCO violated the Act when it approved the "establish[ment] [of] a specialized transfer capability for 911 calls between PSAPs served by AT&T and by Intrado when the PSAPs - which are not a party to the interconnection agreement - request it." AT&T Initial Brief at 33. As previously explained, the PUCO was entitled to invoke Section 251(a) of the Act in structuring inter-PSAP interconnection arrangements.[47] AT&T's tired objections concerning "open

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PUCO's previous decisions in the *Embarq Arbitration Award* and *CBT Arbitration Award*, as well as its decision in Intrado Comm's arbitration with Verizon, which was issued subsequent to the *Arbitration Award* at issue here. *See Embarq Arbitration Award* at 33; *CBT Arbitration Award* at 14-15; *Verizon Arbitration Award* at 5-6.

[46] AT&T's only remaining substantive claim - alleged excessive cost-shifting due to the PUCO's decision, *see* AT&T Initial Brief at 29 - is undercut by its historic endorsement of this method (and consequent expenses) of 911 interconnection in its dealings with CLECs. *See* AT&T Hearing Exhibit 3 (Record Index No. 53) (Attachment No. 17); *see also Entry on Rehearing* at 20 (finding that the POI decision "does not represent an unlawful taking as the interconnection agreement includes compensation to AT&T, where appropriate, and the facilities in question do not accrue to the sole benefit of Intrado").

[47] The PUCO's decision recognized that the ability for interconnected carriers to transfer 911 calls from their PSAP customers to the PSAP customers of the other carrier is vital to public safety. *Arbitration Award* at 38. Intrado Comm estimates that as many as thirty percent (30%) of all mobile 911 calls must be transferred to the

issues" and the PUCO's need to choose between Section 251(a) or 251(c) holdings are therefore of no account. AT&T simply does not understand the difference between "issues" for purposes of 252(b)(2) and the application of applicable law.

AT&T also misinterprets the PUCO's prior holding in the *Embarq Arbitration Award*. AT&T Initial Brief at 33. "Inasmuch as peering arrangements do not involve interconnection of a competing carrier's network with an ILEC's network," the PUCO stated, "Section 251(c) does not apply." *Embarq Arbitration Award* at 8. This is *not* a declaration that interconnection does not occur in a PSAP-to-PSAP transfer (where each PSAP is served by a different carrier), as AT&T alleges, but simply an observation that Section 251(c) is inapplicable, inasmuch as a transfer between PSAPs cannot be directly analogized to the inequality of interconnection between an incumbent carrier and a competitor. In a transfer scenario, each carrier has an *equal* obligation to ensure the 911 call gets to the correct PSAP whether the PSAP is served by an ILEC or served by a competitor. The PUCO's conclusion that PSAP-to-PSAP transfer arrangements should be included in the interconnection agreement is supported by the federal definition of "interconnection" in 47 C.F.R. § 51.5, as PSAP-to-PSAP transfer arrangements (where each PSAP is served by a different carrier) certainly contemplate "the linking of two networks for the mutual exchange of traffic." *See AT&T Corp. v. FCC*, 317 F.3d 227, 235 (D.C. Cir. 2003) ("'interconnect' refers to a 'physical linking of two networks'") (citing *Total Telecomms. Servs. v. AT&T Corp.*, 16 FCC Rcd 5726 (2001)).

AT&T also dismisses the importance of interoperability, which is a vital part of a reliable, efficient 911 system. *See* 47 C.F.R. § 51.325(b) (defining interoperability as "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information

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appropriate PSAP for proper emergency call response. *See, e.g.*, Fara Monroe, "911 Call Process May Cause Dangerous Delays," THE BRADENTON HERALD, June 15, 2006 (noting that 50-60 percent of all 911 calls in Florida come from wireless phones and in some jurisdictions of Florida, all wireless calls require re-routing); Sofia Santana, "Cell phone 911 calls are often routed to the wrong call centers," SOUTH FLORIDA SUN-SENTINEL, June 21, 2008 ("Cell phone 911 calls often get routed to the wrong 911 centers because of the location of cell phone towers. This leads to delays in sending help because operators have to figure out where a caller is and which police or fire department should respond, and then transfer the call to that jurisdiction.").

that has been exchanged"). Interoperability ensures that the 911 caller's telephone number and location information can be automatically sent and received seamlessly, and that misdirected 911 calls can be promptly routed to the PSAP best equipped to serve them. *See* Hicks Testimony at 33-34 (Record Index No. 19) (Attachment No. 20); *see also Indiana 9-1-1 Order* at 39 (ordering direct connection to AT&T's ANI/ALI controllers as "[c]urrently, PSAPs served by AT&T cannot transfer calls with both voice and location data to PSAPs served by other providers"). The PUCO had already decided in the *Certification Order* that Intrado Comm and the ILEC must operate in a cooperative manner to ensure that emergency 911 calls continue unimpeded between 911 callers and PSAPs, and Intrado Comm and the ILEC must implement the capability to transfer 911 calls and the associated data across county lines. *Certification Order* at Findings 9, 12. Requiring inclusion of those requirements in the parties' interconnection agreement was the appropriate method to effectuate the PUCO's prior findings in the *Certification Order* and to ensure interoperability. Thus, the PUCO properly required AT&T to include provisions in the interconnection agreement governing the transfer of calls between PSAPs, per the PUCO's duty "to engage in the appropriate regulatory oversight and to ensure that the ultimate interconnection agreement is in the public interest." *Embarq Arbitration Award* at 9; *see Indiana 9-1-1 Order* at 47 ("AT&T's refusal to allow INdigital to [directly] interconnect . . . at the ANI/ALI controllers is contrary to the public interest").

V. THE PUCO'S DECISION TO GRANT INTRADO COMM THE LOWEST RATE USED BY ANY OTHER CARRIER IS CONSISTENT WITH FEDERAL LAW AND ITS APPLICATION IS NARROWLY CIRCUMSCRIBED

In the arbitration, the parties disputed whether AT&T could impose unspecified charges on Intrado Comm for products or services ordered by Intrado Comm (and provisioned by AT&T) that were *not* contained in the parties' interconnection agreement. *Arbitration Award* at 57. The PUCO determined that AT&T could impose charges not otherwise contained in the interconnection agreement for products and services actually provided, but could charge either its tariff rate for such product or service, or if no tariff rate existed, the lowest price in effect at that time for other Ohio

CLECs. *Arbitration Award* at 58. The PUCO's mandate only applies in very limited situations - when Intrado Comm orders a product or service for which a price is not contained in the interconnection agreement *and* that product or service is not contained in an AT&T tariff. The PUCO reasoned that this proposal reflected a "balance" between the parties' proposals - allowing AT&T to impose charges for products and services ordered while protecting Intrado Comm from unknown and unlimited charges by AT&T.[48] *Arbitration Award* at 58.

AT&T's allegations concerning the FCC's "All-or-Nothing" rule, 47 C.F.R. § 51.809(a), are baseless. AT&T Initial Brief at 34. The PUCO's determination is perfectly consistent with the rule, which is concerned only with products or services "provided under an agreement." 47 C.F.R. § 51.809. By contrast, the PUCO's decision in the *Arbitration Award* focuses on instances where products or services are not provided under the terms and conditions of the interconnection agreement and where no separate tariff for the service exists. In addition, AT&T itself admitted in the arbitration proceeding, that it would be highly unlikely that a CLEC would negotiate rates different from the generic CLEC pricing list offered by AT&T, which is the pricing AT&T sought to apply in absence of a tariff rate. *See* Tr. Vol. II at 49-50 (Record Index No. 23) (Attachment No. 16). Thus, Intrado Comm is not wrongly "obtain[ing] the benefits" of another interconnection agreement, *see* AT&T Initial Brief at 34, and the All-or-Nothing rule simply does not apply.

VI. THE PUCO PROPERLY REQUIRED CONTRACTUAL LANGUAGE FOR THE ORDERING AND PRICING OF INTERCONNECTION ARRANGEMENTS

AT&T fails to challenge the PUCO's conclusions concerning ordering and pricing processes for interconnection, remarking only that if this Court overrules the PUCO's judgment on POIs, these arrangements must be dismissed as well. AT&T Initial Brief at 33, n.26. While a teleology of this

[48] Moreover, after billing Intrado Comm for these products or services at the lowest rate for Ohio CLECs, AT&T may terminate its provision at any time. As the PUCO explained, AT&T is permitted "to reject future orders for the product or service until such time as terms and conditions are incorporated into the interconnection agreement." *Arbitration Award* at 59. Thus, the kind of protection AT&T seeks from mandated rates will only arise in the context of a *deliberate choice* by AT&T to provide an unlisted product or service without negotiation, and may be *terminated at any time by AT&T* after the initial billing occurs.

sort falls far below the standard of an actionable claim, the prudence of the PUCO's reasoning in regards to pricing and ordering should nonetheless be noted.

As Intrado Comm has already explained, interconnection with AT&T contemplates cooperative and equivalent functionality. To this end, both parties will necessarily be reliant upon one another to purchase services in facilitating the exchange of emergency calling traffic. No deviation from industry norms has been contemplated. During the arbitration Intrado Comm provided detailed information attesting to its use of service request methods similar to those employed by AT&T. *See* Hicks Testimony at 38, Hicks Exhibit 10 (Record Index No. 19) (Attachment No. 20). AT&T retains the ability to alter its own ordering process for competitors as it sees fit. *See* Tr. Vol. 1 at 68 (Record Index No. 54) (Attachment No. 19).

Language detailing the ordering and pricing of services and facilities is a vital component of the overall interconnection arrangements. *See* Hicks Testimony at 38 (Record Index No. 19) (Attachment No. 20). Only in this way can collaboration between and amongst the networks be guaranteed, and the vital quality of interoperability be assured. *See Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 11 FCC Rcd 19392, ¶ 178 (1996); *Indiana 9-1-1 Order* at 50 (standard Section 251 interconnection agreement between AT&T and INdigital insufficient for specialized E911 traffic arrangements). The PUCO committed no error in requiring AT&T to utilize Intrado Comm's ordering process and pay Intrado Comm certain rates when AT&T connects to Intrado Comm's network, just as Intrado Comm will use AT&T's ordering process and pay AT&T's rates when it orders services from AT&T or interconnects to AT&T's network for termination of 911 calls to AT&T's PSAP customers. *Arbitration Award* at 21, 40-41.

VII. IN THE ALTERNATIVE, THIS COURT MAY DEFER REVIEW OF THESE ISSUES PENDING RESOLUTION BY THE FCC

Issues similar to those raised by AT&T here are currently pending in arbitration proceedings before the FCC. In those proceedings, the FCC has stepped in the shoes of the Virginia State Corporation Commission, which refused to act on Intrado Comm's arbitration proceedings with Embarq and Verizon in that state.[49] While the instant Brief demonstrates that the PUCO decision at issue is consistent with federal law and not arbitrary and capricious, the Court may defer consideration of this case pending the outcome of the FCC proceedings or otherwise refer these issues to the FCC for resolution under the doctrine of primary jurisdiction given that the FCC proceeding will address many of the same questions currently before this Court. *See United States v. Any and All Radio Station Transmission Equip.*, 204 F.3d 658, 664 (6th Cir. 2000). In any event, the Court should not disturb the PUCO's findings while these issues are squarely before the FCC, the entity charged with interpreting provisions of the Act, including the import and meaning of 47 U.S.C. § 153(47). *See, e.g.*, *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002) ("We review the [state commission]'s interpretation of the Act *de novo* and do not accord any deference to its interpretation of the Act. Of course, we consider the FCC's interpretation of the Act persuasive authority because Congress authorized the FCC to issue rules 'to implement the requirements' of § 251, the section relating to duties and terms of interconnection, unbundled access, wholesaling, and other matters.').

[49] *Petition of Intrado Commc'ns of Va. Inc. Pursuant to Section 252(e)(5) of the Commc'ns Act for Preemption of the Jurisdiction of the Va. State Corp. Comm'n Regarding Arbitration of an Interconnection Agreement with Central Tel. Co. of Va. and United Tel. – Se., Inc. (collectively, Embarq), et al.*, 23 FCC Rcd 17867 (2008) (consolidating the Embarq and Verizon arbitrations).

CONCLUSION

For the foregoing reasons, AT&T's claims should be denied and the decision of the Public Utilities Commission of Ohio reaffirmed.

Respectfully submitted,

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Dated: April 6, 2010

Its Attorneys

LIST OF ATTACHMENTS

1. PUCO Case No. 07-1280-TP-ARB, Arbitration Award (Record Index No. 36)
2. PUCO Case No. 07-1280-TP-ARB, Entry on Rehearing (Record Index No. 46)
3. PUCO Case No. 07-1199-TP-ACE, Certification Order,
4. PUCO Case No. 07-1199-TP-ACE, Certification Rehearing Order
5. PUCO Case No. 07-1216-TP-ARB, Arbitration Award
6. PUCO Case No. 07-1216-TP-ARB, Entry on Rehearing
7. PUCO Case No. 08-537-TP-ARB, Arbitration Award
8. PUCO Case No. 08-537-TP-ARB, Entry on Rehearing
9. PUCO Case No. 08-198-TP-ARB, Arbitration Award
10. PUCO Case No. 08-198-TP-ARB, Entry on Rehearing
11. Excerpts - PUCO Case No. 07-1199-TP-ACE, AT&T's Application for Rehearing and Request for Clarification (filed Mar. 6, 2008)
12. Texas Docket No. 36176, Order on Motion for Reconsideration of Order on Threshold Issue No. 1 and Granting AT&T's Motion for Summary Decision (Feb. 4, 2010)
13. Excerpts - North Carolina Docket No. P-1187, Sub 2 Recommended Arbitration Order (April 24, 2009)
14. Excerpts - AT&T Ohio Post-Hearing Reply Brief (Record Index No. 27)
15. Excerpts - AT&T Ohio Application for Rehearing (Record Index No. 38)
16. Excerpts - Volume II Transcript (Record Index No. 23)
17. AT&T Hearing Exhibit 3 (Record Index No. 53)
18. Excerpts - AT&T Ohio Initial Post-Hearing Brief (Record Index No. 25)
19. Excerpts - Volume I Transcript (Record Index No. 54)
20. Excerpts - Testimony of Thomas Hicks on behalf of Intrado Communications Inc. (Record Index No. 19)
21. Indiana Cause No. 43499, Final Order (Feb. 10, 2010)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Defendant Intrado Communications Inc.'s Merit Brief* was sent to the below listed parties through the Court's ECF system on this 6th day of April 2010:

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